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No. 81-2242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE W. SEIBEL, individually and as a police officer of the City of Chicago Police Department,

Petitioner,

vs.

N. W. WHITLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 4, 1982

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QUESTION PRESENTED

Whether a state court determination of probable cause for an arrest collaterally estops a subsequent action for false arrest pursuant to 42 U.S.C. §1983.

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Your Petitioner, George W. Seibel, individually and as a police officer of the Chicago Police Department, respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on March 25, 1982.

OPINIONS BELOW

The memorandum opinion and order of the district court in favor of plaintiff-respondent, entered June 2, 1980, is unreported but is reproduced below in Appendix B.

The opinion of the Court of Appeals, filed March 25, 1982, affirming the judgment of the district court is not yet reported. It is reproduced in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1982. On May 6, 1982, the Court of Appeals granted petitioner's motion to stay the issuance of the mandate until June 7, 1982.

This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Code

Title 42 U.S.C. §1983:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

Illinois Revised Statutes

Chapter 38, par. 109-3(a):

Preliminary examination.

The judge shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant.

STATEMENT OF THE CASE

Respondent, N. W. Whitley, was arrested on October 7, 1974, for a traffic violation in the City of Chicago. As a result of this arrest, respondent was identified by a Mr. and Mrs. James Williams as the man who had broken into their home and sexually assaulted Mrs. Williams. Respondent denied the Williams' charges and offered an alibi defense which petitioner Seibel, a Chicago police officer, was assigned to investigate.

Petitioner Seibel was unable to verify the alibi with the information supplied him and on October 14, 1974, plaintiff was arrested on a complaint signed by the Williams' charging respondent with armed robbery and deviate sexual assault.

Respondent was incarcerated in the Cook County Jail for one month, until November 14, 1974, when a preliminary hearing was held in the Criminal Court of Cook County. Mrs. Williams testified for the state and identified the plaintiff as the man who assaulted her. Respondent, who was represented by private counsel, made no mention of the alleged alibi. A finding of probable cause was made on all counts and respondent was later indicted by the Grand Jury of Cook County, Illinois.

Whitley remained in custody until February 3, 1975, the criminal trial date. Evidence supporting the alibi was presented and the charges against respondent were dismissed.

On July 14, 1976, respondent filed a complaint in the United States District Court for the Northern District of Illinois alleging that petitioner, an investigator in the Chicago Police Department, arrested him without probable cause. The complaint was based upon 42 U.S.C. §§1981, 1983 and 1985, with jurisdiction premised upon 28 U.S.C. §1331. Respondent alleged that petitioner did not properly investigate his alibi defense, resulting in an unconstitutional incarceration in Cook County Jail for 113 days.

On November 9, 1978, judgment was entered for respondent and $40,000.00 in damages were awarded. Petitioner appealed this judgment. The Court of Appeals for the Seventh Circuit remanded the case for a new trial to correct an erroneous jury instruction regarding the Illinois law on preliminary hearings. The case was tried a second time. On June 2, 1980, respondent was awarded damages of $60,000.00 (Appendix B).

Petitioner took a second appeal. Respondent cross-appealed the attorneys' fee of $10,000.00 awarded under 42 U.S.C. §1988, claiming they were insufficient. On March 25, 1982, the Court of Appeals rendered its decision affirming, in total, the judgment of the district court (Appendix A). This petition for writ of certiorari is based upon this second opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S OPINION IN *ALLEN v. McCURRY*.

The question presented in this case is whether a state judicial determination that probable cause existed for respondent's arrest precludes a subsequent action for false arrest under the provisions of 42 U.S.C. §1983. In *Allen v. McCurry*, 449 U.S. 90 (1980), this court held that issues decided in state court proceedings were to be given *res judicata* effect in subsequent federal civil rights litigation. Despite this holding, the court of appeals below refused to accept a state judicial determination that probable cause existed for respondent's arrest, a determination that completely precludes a subsequent civil rights action for false arrest.

Footnote 18 of the *McCurry* opinion clearly states that "a state court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith." 449 U.S. at 102. A finding that probable cause existed for an arrest is a complete defense to a civil rights suit for false arrest. *Pierson v. Ray*, 386 U.S. 547 (1967).

In the instant case, a probable cause hearing was held in the state criminal courts subsequent to the respondent's arrest. Respondent was represented by counsel of his choice and was identified by the victims as the man who attacked them. Although respondent claimed an alibi defense he chose not to present this defense at the preliminary hearing, although Illinois law gave respondent the right to present evidence in his behalf. Illinois Revised Statutes, 1973, Chapter 38, par. 109-3. The criminal court judge determined that probable cause existed for respondent's arrest and respondent was held

in custody. It is this state court determination, made after an adversarial proceeding, that the court of appeals has held not to be given *res judicata* effect.

In a prior opinion, *Brubaker v. King*, 505 F.2d 534 (7th Cir., 1974), the court of appeals had held that state probable cause hearings could not preclude a subsequent civil rights action due to the disparities in issues between a finding of probable cause and a federal false arrest claim. The *Brubaker* opinion was, however, specifically overruled by this Court in *McCurry* which stated:

> In *Brubaker v. King*, 505 F.2d 534, 537-538, the Court of Appeals for the Seventh Circuit held that since the issues in the state and federal cases were different—the legality of police conduct in the former and the good faith of the police in the latter—the state decision could not have preclusive effect in the federal court. *This solution, however, fails to recognize that a state court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith.* 449 U.S. at 102. (emphasis added)

Notwithstanding the clear opinion of this Court, the court of appeals continued to follow its prior rulings that a state court finding of probable cause has no preclusive effect on subsequent false arrest claims.

The court of appeals stated that it did not need to follow this Court's opinion in *Allen* because:

> . . . At most, the footnote in *Allen* suggests that we erred in thinking that there could never be identity of issues in a preliminary hearing and a Section 1983 suit. (Appendix A, p. 5a.)

However, footnote 18 did more than "suggest" that it might be possible to have identical issues in a probable cause hearing and a federal civil rights false arrest

action, it explicitly stated that a state court finding of probable cause conclusively bars a later false arrest claim. It is apparent that the court of appeals does not approve of the use of collateral estoppel in civil rights cases, the direct holding in *Allen*. This is clearly indicated by the court's conclusion that:

> We doubt that collateral estoppel would ever be appropriate solely on the basis of a preliminary hearing. . . . (Appendix A, p. 9a.)

The court of appeals' opinion in this case completely denudes the holding in *Allen*. It suggests that *Allen* is limited to suppression hearings (Appendix A, p. 9a), or that *Allen* applies to cases only where the state court parties fully present their case to the state court. Such distinctions are meaningless. *Allen* clearly holds that state court findings are subject to full *res judicata* and collateral estoppel effects, and the decision of the court of appeals effectively ignores *Allen* and reinstates the holding of *Brubaker* which this Court has repudiated.

A writ of certiorari should issue in this case because of the clear conflict between the court of appeals' opinion below and this Court's holding in *Allen* and the unjustified refusal by the court below to apply collateral estoppel in civil rights actions.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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June 4, 19[illegible]

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